No. 15,361

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH J. PARENTE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF.

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FILED
JUL 15 1957
PAUL P. O'BRIEN, CLERK

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JURISDICTION.

Jurisdiction is invoked by appellant.

21 U.S.C. §134 (sic);

26 U.S.C.A. §§4704 and 4237; and

18 U.S.C. 375 (sic).

It appears that appellant Parente was indicted under *Section 371 of Title 18 United States Code,* conspiracy to sell and conceal narcotic drugs. Appellant is appealing from the judgment of conviction on this charge.

STATEMENT OF THE CASE.

Appellant was indicted on May 2, 1956 for conspiracy to sell and conceal narcotic drugs. One Jones Chesley White was charged in the first and second counts of the same indictment with the sale of some 10 ounces of heroin and the concealment of approximately 25 ounces of heroin. The conspiracy count of the indictment charged appellant, White and one Martin Bert Haley. White, Haley and appellant went to trial before a jury on July 23, 1956. On July 25 the jury returned a verdict of guilty as to White and appellant and were unable to come to a decision as to the guilt of Martin Bert Haley. Appellant Parente was sentenced on July 30 to a term of four years and received a $100 fine. Appellant appeals from this judgment of conviction.

Appellant's conviction resulted from a conspiracy to sell and conceal heroin which resulted in the delivery of approximately 10 ounces of heroin to a State narcotic agent on March 10, 1956 by the defendant White (Tr. 10-16). This sale of heroin was purportedly made by White to Agent McBee of the State Bureau of Narcotics and one Evo Cardella (Tr. 11) who was operating as an informer for the State Bureau of Narcotics (Tr. 14).

The defendant White had given a full confession concerning his part in the conspiracy to Agent Grady of the Federal Bureau of Narcotics (Tr. 99). In a signed and witnessed statement, White stated that he arrived in the United States from Guam on February 4, 1956 with approximately 27 ounces of heroin (Tr.

99-100); that he went to Las Vegas, Nevada on February 12 (Tr. 101), and met Joseph Parente some two or three days later at a horse betting parlor (Tr. 101). White further stated that after telling Parente of his heroin, Parente told him that he would come to San Francisco and find a reliable person to purchase the narcotics (Tr. 102). On February 22, according to White, Parente contacted him and arrangements were made to go to San Jose to meet a customer for heroin (Tr. 102, 103). In San Jose, Parente, according to the statement, introduced one Cardella to White as a prospective purchaser of narcotics (Tr. 103). This introduction took place on February 23, 1956 (Tr. 104). This statement was offered and admitted in evidence only against the defendant White (Tr. 99).

Evo J. Cardella testified at the trial (Tr. 42). According to his testimony he was introduced to appellant on the 22nd or 23rd of February by appellant's codefendant Haley (Tr. 45). After his introduction to Mr. Parente, appellant Parente stated: "I'll take you across the street and meet the fellow that has the stuff and we walked across the street." (Tr. 47.) Across the street, Cardella testified, they met defendant White (Tr. 47). Appellant Parente then introduced Cardella to White and said: "I will leave you two fellows with your business." (Tr. 48.) Immediately thereafter Cardella and White commenced negotiations for the purchase of White's heroin (Tr. 49). An agreement was reached for White to deliver to Cardella sample of the heroin (Tr. 49). On the next

day White brought an ounce of narcotics to Cardella and told him that this was a sample (Tr. 52). Cardella further testified that he met White together with Agent McBee, at which time he introduced McBee as a prospective purchaser of narcotics (Tr. 57-58).

On cross-examination Cardella again testified that appellant Parente had informed him he was going to introduce him to the man that had the "stuff" and did, in fact, introduce him to appellant's codefendant White (Tr. 71, 85). One Agent Goodman of the Federal Bureau of Narcotics testified concerning a conversation he had with appellant, in which he informed appellant of White's arrest. At that time appellant Parente stated: "Tell me, did White do any talking?" (Tr. 122).

Appellant made a motion to strike at the conclusion of the Government's case (Tr. 148). Thereafter the defense presented their case. Defendant Haley testified that on February 23 he had a conversation with Parente in which appellant stated: "A gentleman by the name of White has some stuff that he wanted to get rid of." (Tr. 160). Thereafter Haley testified he introduced Cardella to appellant (Tr. 164, 186).

Appellant testified in his own defense that he had never even met Cardella (Tr. 200). He denied that he was introduced to Cardella by Haley (Tr. 200). He also denied telling Haley that his codefendant White had some "stuff". He admitted meeting White in Las Vegas (Tr. 194). He claimed that the only knowledge he had of White dealing in contraband was

in connection with some jewelry (Tr. 197, 198). He admitted calling White from Las Vegas on February 21 (Tr. 211). He denied introducing White to Cardella (Tr. 216).

ARGUMENT.

I.

THE EVIDENCE WAS SUFFICIENT.

The conspiracy in this case resulted in the delivery of approximately ten ounces of heroin on March 10, 1956 (Tr. 10 through 16). This sale of heroin was made to Agent McBee of the Bureau of Narcotics and Ebo Cardella (Tr. 11). The delivery of one ounce of heroin was made to Cardella on the 24th of February (Tr. 49). The deliveries were made to appellant's coconspirator White. Those deliveries were made, however, as a result of appellant Parente's bringing into contact Cardella and White. But for Parente's introduction of the customer Cardella to the seller White, no violation of the narcotic laws, at least one involving Cardella, would ever have occurred.

The sixth overt act of the indictment charges that Parente introduced Cardella to the defendant White. This act was an act in pursuant of the conspiracy to violate the narcotic laws. The substantive offenses which are charged in the first and second counts of the indictment could not have occurred were it not for the act of introduction performed by appellant

Parente. White, of course, had confessed the whole conspiracy. This evidence was, however, not admissible against Parente and the jury was so instructed (Tr. 99). Evidence admissible against Parente, however, showed that White and appellant met in Las Vegas, Nevada (Tr. 194). A phone call was made to White on his return from San Francisco from Parente in Las Vegas (Tr. 211). Subsequently Parente came to California (Tr. 45). Appellant's codefendant Haley testified that on February 23, Parente told him that White had some stuff "that he wanted to get rid of." Both Haley and Cardella both testified that Parente was introduced to Cardella in Haley's bar (Tr. 45), 164, 186.

The act most calculated to effect the object of the conspiracy, that is a sale of heroin, was then committed by appellant. Parente brought together the prospective purchaser of narcotics and the seller thereof (Tr. 47, 48).

Appellant's knowledge of the consequences of this act are shown by his statement to Cardella concerning "stuff". Before introducing White and Cardella Parente stated: "I'll take you across the street and meet the fellow that has the 'stuff' . . ." (Tr. 47). At the time of the introduction appellant stated: "I'll leave you two fellows with your business." (Tr. 48). "Stuff" is, of course, the universally used pseudonym for narcotics. Appellant's statement that he would leave White and Cardella to their business indicates his knowledge that a commercial transaction with respect to "stuff" was to take place.

Parente's act in introducing Cardella and White furthered the general conspiracy to sell narcotics and made possible a specific sale, that is the sale between White and Cardella as to the ounce sample of narcotics and the 10-ounce sale which took place in March. The jury could properly infer that Parente was aware of the consequences of his act of introduction from his statements concerning "stuff" and business. If a defendant aids a conspirator or conspiracy, knowing in a general way the purpose is to break a law, a jury may infer that he entered into an agreement with him.

McDonald v. United States (8th Cir.), 89 F.2d 128;

Galatas v. United States (8th Cir.), 80 F.2d 850;

Marino v. United States (9th Cir.), 91 F.2d 691.

In appellant's actions we have evidence of an acting in concert in pursuance of a common design toward the accomplishment of a common purpose. Evidence of such action in concert is sufficient to show a conspiracy.

American Tobacco Co. v. United States, 328 U.S. 781;

Marino v. United States, supra;

Coates v. United States, 50 F.2d 173-174.

A conspiracy, of course, may not be proved by the act and declaration of a co-conspirator alone. There must be evidence aliunde before the acts and declarations of one co-conspirator are admissible against another.

Glasser v. United States, 315 U.S. 60.

Appellant's introduction of Cardella to White as the man who had the "stuff" forms the necessary independent evidence of appellant's knowledge of the nature of a conspiracy and his intention to cooperate for the accomplishment of its unlawful end. White's act in delivering and selling narcotics and carrying on negotiations for the attainment of that end showed that a conspiracy in fact existed.

The sale and distribution of narcotic drugs requires both a supply of narcotics and connections to distribute that supply. White and Parente each supplied an indispensible element for the accomplishment of the conspiracy. White had heroin. Parente knew people and was able to come into contact with people who were interested in purchasing heroin. What occurred on February 23 was sufficient evidence for the jury to find that an unlawful agreement in fact existed between White and Parente. This court is, of course, not concerned with the weight of the evidence before the jury. All that is required is that there be substantial evidence in the record indicating that appellant engaged in a conspiracy.

Glasser v. United States, supra;

Gage v. United States (9th Cir.), 167 F.2d 122, 124;

Barcott v. United States (9th Cir.), 169 F.2d 929, 931, cert. denied;

United States v. Socony Vacuum Oil Co., 310 U.S. 150, 254.

Appellant's only argument against considering the tesitmony of Cardella concerning appellant's introduc-

tion of Cardella to White is that the conspiracy had ended at the time of the introduction. (Appellant's Brief, page 15.) To be sure, the act and declarations of a co-conspirator are *not* admissible against a defendant after the termination of a conspiracy. However, there must be some showing that the conspiracy is ended and the burden is, of course, on the conspirator to so show.

Krulewitch v. United States, 336 U.S. 440.

In the instant case the conversation referred to by appellant took place prior to the sale of narcotics which was the object of the conspiracy. There is no evidence that appellant took any affirmative steps to leave the conspiracy prior to the sale. In fact, appellant's actions in bringing together a prospective purchaser and White shows only an intent that a sale be consummated and has no tendency to show a withdrawal from the object of the conspiracy whatsoever. The fact that appellant did not desire to be present when the narcotics were passed shows his caution rather than his lack of desire to effectuate a sale of heroin.

Since there was evidence in the record independent of any acts and declarations of White showing appellant's indispensible connection with the conspiracy and since appellant's knowledge of the existence of the conspiracy was also shown by his statements made prior and during his introduction of Cardella to White, we submit that the evidence was sufficient for the jury to infer that he had entered into a conspiracy to conceal and sell heroin.

II.

THE DECLARATIONS OF WHITE IMPLICATING PARENTE IN THE CONSPIRACY WERE ADMISSIBLE.

Appellant objects to the admission in evidence of two declarations of his co-conspirator White made during the existence of the conspiracy. Agent McBee testified that White had told him that he could not come down from a $400 price because "he and a person by the name of Joe Parente were in it together and therefore he couldn't cut the price." This statement was, of course, admissible against the defendant White and since the defendant White was also on trial, could hardly have been excluded by the court. It is, however, well established law that the admissions of one partner tending to establish the existence of a conspiracy are admissible against the other partner.

Greer v. United States, (10th Cir.), 227 F.2d 546, 548;

In *Neal v. United States* (D.C. Cir.), 185 F.2d 441, cert. den., evidence was admitted of declarations by a co-conspirator who had delivered the narcotic that he had delivered marijuana cigarettes instead of marijuana because the defendant there said he was unable to get bulk marijuana. In *United States v. Compagna* (2nd Cir.) 146 F.2d 544, the conversations of a co-conspirator which incidentally touched on the appellant's part there in the conspiracy were also held to be admissible. The court held that this evidence was admissible since independent evidence had been admitted of the defendant's connection with the conspiracy.

The declaration of co-conspirators are admissible against each other because one is the agent of the other. As the court in *United States v. Sansone,* (2d Cir.), 231 F.2d 887 stated:

> ". . . and since co-conspirators have an identity of interest, the admissions of one member have probative value against another and hence are admissible as evidence against the other." (Tr. 892).

The declaration above referred to formed part of the crime itself. The statement was part of the negotiations for the sale. Hence it was admissible in evidence.

The other declaration objected to was a statement of the witness Cardella that when White brought him the ounce sample of heroin and Cardella told White that he didn't want that much, White told him "that Mr. Parente told him to go ahead and bring an ounce up". This conversation was part of the crime itself. It also formed essential evidence of the negotiation for the sale of heroin. It was a declaration and pursuant to the object of the conspiracy.

Evidence of the declaration of one member of a conspiracy in the absence of the other is admissible when it is shown (1) that a conspiracy is in existence, (2) that the appellant is connected therewith, (3) that the declaration was made during the existence of the conspiracy, and (4) that it was in furtherance of the conspiracy.

United States v. Sansone, supra, at 892.

Here the existence of the conspiracy was shown by appellant's bringing into contact purchaser and seller of heroin; and the sale of heroin which actually resulted. Appellant was shown by independent evidence to be connected with the conspiracy by his acts and declarations but for which the unlawful sale of heroin could not have resulted. The conspiracy was not shown to have terminated. The conversation itself was concerned with the very sale which was the object of the conspiracy. The evidence was therefor admissible.

III.

THE ORDER OF PROOF IS IN THE DISCRETION OF THE COURT.

There can be no more well-established rule than that the order of the proof of a conspiracy case is within the discretion of the trial judge.

Newman v. United States (9th Cir.), 156 F.2d 8;

United States v. Pugliese (2d Cir.), 153 F.2d 497, 500;

United States v. Sansone, supra.

Whether or not the testimony of Agent McBee concerning the acts and declarations of the defendant White was admissible against Parente does not depend on whether appellant's connection with the conspiracy was shown before or after the McBee testimony was admitted. The only question involved is whether the evidence aliunde referred to in the *Glasser* case, supra, was present.

As we have previously indicated, there is abundant evidence showing Parente's part in the conspiracy. The order of proof, therefore, in a case involving three defendants was unimportant. If at the conclusion of the case there was no evidence against Parente, then, of course, the court should have granted a verdict of acquittal. However, there was evidence against Parente connecting him with the conspiracy and, therefore, the acts and declarations of his co-conspirators were admissible against him.

The court admitted this evidence subject to a motion to strike. It could have admitted the evidence only against some defendants and then at the conclusion of the case after appellant's connection with the conspiracy was shown admitted the evidence as to him. One method of treating this evidence was as good as the other so long as there was independent evidence against appellant. Independent evidence did show that appellant was an essential part of the conspiracy.

IV.

APPELLANT HAS FAILED TO COMPLY WITH RULE 30.

In Specification of Error No. 8, appellant objects to the failure of the court to give instructions concerning the admissiiblity of both the acts and declarations of co-conspirators and also concerning the admissibility of co-defendant White's confession.

Appellant has not included in the record on appeal the charge of the court. It is, therefore, impossible

for the court to determine what instruction the trial court gave. He has not complied with Rule 18(2)(d) of this court, which provides: "When the error alleged is to the charge of the court, the specifications shall set out the part referred to in totidem berbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial. In a number of cases this court has indicated that where this is no compliance with Rule 18(a)(d) the court may disregard the claim of error.

Gordon v. United States (9th Cir.), 202 F.2d 596;

Lee v. United States, 238 F.2d 341;

Mitchell v. United States, 213 F.2d 951, 957;

Kobey v. United States (9th Cir.), 208 F.2d 583.

Furthermore, it does not appear that appellant at any time either objected to any instructions of the court or requested any instructions. Therefore, as to instructions of the court, appellant has waived any error.

Brown v. United States (9th Cir.), 222 F.2d 293, 298;

Kobey v. United States, supra;

Hersog v. United States (9th Cir.), 235 F.2d 664;

Rule 30, Federal Rules of Criminal Procedure.

Appellant objects in some way in his brief to the instruction of the court with respect to the confession against White. Whether or not the court instructed

the jury concerning evidence submitted against one defendant and not against the other does not appear, since appellant has failed to include the record of the charge to the jury. In the absence of such a record the court should presume that a proper instruction was given. *U.S. v. Vanegas* (9th Cir.), 216 Fed. 657.

At the time of the introduction of this evidence, Mr. Riordan, counsel for the Government, stated: "Your Honor, at this time we will offer in evidence this statement as against the defendant White alone." (Tr. 98). The court at that time stated: ". . . It is being received only as against the defendant White. And when evidence is introduced as to one defendant and not as to other defendants, the jury will consider it only as against a defendant against whom it is offered." (Tr. 99).

What further appellant desired the court to instruct does not appear in either appellant's brief or in the record of the trial. Appellant made no objection and thus does not comply with Rule 30 at the time of trial and in his brief he nowhere states in what respect the court's instruction was inadequate nor has he complied with Rule 18(2)(b).

Appellant's objections directed to the admission of the conversation between Cardella and White appearing at page 49 of the Transcript are subject to the same infirmities. Appellant did not request an instruction at the time the evidence was introduced. He has not included the charge of the court at the conclusion of the evidence. He has not even suggested

in his brief what instruction he desired the court to give and he has, of course, not complied with either Rule 30 of the Federal Rules of Criminal Procedure or Rule 18(2)(d) of this court.

V.

THE USE OF THE WORD "STUFF" BY APPELLANT WAS PROPERLY ADMITTED.

The word "stuff" is universally used by dope peddlers to refer to narcotics. This court has decided literally hundreds of cases in which this slang expression for dope has been used. Appellant has objected in two different instances where there is testimony the appellant used the word "stuff".

Appellant's first objection is directed to defendant Haley's testimony concerning Parente's use of the word. At page 160 of the Transcript, the record reads as follows:

> "Q. Will you tell the Court and the jury what Mr. Parente said and what you said at that time and place?
>
> A. Mr. Parente said a gentleman by the name of White has some stuff that he wanted to get rid of. I told Mr. Parente 'I don't want nothing to do with it and get Mr. White out of my place.' "

No objection was made to this question and answer. At page 175 of the Transcript Haley was asked on cross examination "What did you understand Parente

to mean by 'stuff' ". The answer was: "I thought maybe he meant some narcotics." (P. 176). Since the word had been used by Haley previously without objection by appellant, any claim of error might be deemed waived.

What Haley understood by appellant's use of the word, however, was relevant and admissible. When a word is used in a sense which has connotations different from its ordinary meaning, a witness may testify what his understanding of the term was in relation to the circumstances in which the word was used and the person who used it. Haley was a long time acquaintance of appellant. He also testified concerning a conversation he had with appellant. He knew because of his friendship with Parente what appellant ordinarily meant when he used certain expressions. Furthermore, he was in a position to know the essential flavor that the circumstances of the conversation gave to the words actually used. As was stated in *Batsell v. United States* (8th Cir.), 217 F.2d 257: "While the ordinary rule confines the testimony of a lay witness to concrete facts within his knowledge or observation, the court may rightly exercise a certain amount of latitude in permitting a witness to state his conclusion based on common knowledge and experience."

In the *Batsell* case, a witness testified that the defendant's use of the word "job" was thought by the witness to mean prostitution. The court held that the witness, a friend of the defendant, was in a position to know the sense in which the term was used.

Appellant did not choose to deny that he used the word in a sense testified by the witness. He simply denied the conversation altogether. Appellant had an opportunity to cross examine the witness Haley as to the basis of his conclusion that Parente meant heroin by his use of the word "stuff". Appellant did not choose to exercise that opportunity.

Appellant's second objection to the use of the word "stuff" was at pages 46 and 47 of the Transcript where Cardella testified that appellant Parente told him that "I'll take you across the street and meet the fellow that has the 'stuff' ". (Tr. 47). Appellant objects to this testimony on the grounds that it was in response to a leading question. However, the record reveals that an objection to one of the questions in the series was sustained on the grounds that it was leading. At the time the objected-to answer was received, the question was: "State the conversation." We do not understand how a question could be any less leading. Furthermore, there was no question on the part of Government counsel in which the word "stuff" is used.

Appellant, on page 110 of his brief, makes an accusation that the witness Cardella had been coached and "forgot his lines." Appellant cites no evidence in the record to support this accusation. There is no inference that can be so made from the testimony in the record. It would appear to us that such an argument, if it can be called that, would be better directed to a jury than to this court.

VI.

THE OFFER OF THE STATE GRAND JURY TRANSCRIPT WAS PROPERLY REFUSED.

Appellant at the commencement of his case in chief, offered a copy of the reported transcript of agent McBee's testimony before the State grand jury. This offer was refused on the grounds that a proper foundation for impeachment was not laid at the time the witness was on the stand.

As was stated in *United States v. Angelo* (3rd Cir.), 153 F.2d 247 at 251: "Moreover, it has long been held that a condition precedent to a direct contradiction of a witness by what he has said on a previous occasion is the laying of a proper foundation." This court has held that when a prior inconsistent statement is used for the purpose of impeachment, the statement must first be related to the witness along with the circumstances of time, place, and persons present, and the witness asked if he made the statements and given an opportunity to explain them.

Zamora v. United States (9th Cir.), 112 F.2d 631, 634;

Osborne v. United States (9th Cir.), 17 F.2d 246, 250.

In the *Zamora case,* the evidence offered was testimony at a preliminary hearing and there as here the witness admitted that he had testified at the proceeding, but no further foundation was laid. See also *Buston v. United States* (5th Cir.), 175 F.2d 960, 965 where grand jury testimony was involved.

Furthermore, it should be mentioned that there is nothing in the record to indicate that McBee's testimony before the State grand jury was in any way inconsistent with his testimony at this trial. Appellant did not mark the grand jury testimony for identification. He did not make any offer of proof of its contents and he did not establish to the witness McBee that McBee had made any statements to the grand jury contradicting his statements at the trial.

The offer of the grand jury transcript was therefor properly refused.

VII.

THE "JEWELRY" EVIDENCE WAS PROPERLY TREATED BY THE COURT.

Appellant's 11th Specification of Error reads as follows: "The court is guilty of prejudicial error in refusing to admit evidence against another crime than the one charged as a defense. In refusing to permit counsel for appellant to establish that in truth and fact appellant was only informed about and had interest in jewelry."

Appellant attempted to introduce into evidence some customs records having to do with apparently a seizure of jewelry (Tr. 152-153). A stipulation, however, was entered into as follows: "Counsel stipulated that he did have some jewelry that was taken from him by the customs officers." This in essence was all that the defense could possibly have wanted. Not only was the fact that appellant was attempting to prove allowed in evidence, but this fact was made

binding on the jury by a stipulation. Appellant can point to no place in the trial that the court refused him an opportunity to press his defense that he was only interested in helping White dispose of contraband jewelry and not aware or interested in helping White distribute heroin.

At the time that the jewelry itself was offered, appellant had not yet taken the stand nor had any foundation for the jewelry's admissibility been laid. The court by requesting and receiving a stipulation gave appellant far more than he was entitled to on the record as it then stood.

CONCLUSION.

All evidence was properly admitted against appellant. The court properly refused to admit the evidence of the grand jury transcript and the jewelry of defendant White and the evidence was sufficient to convict appellant.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 1, 1957.

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